

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

IN RE: Robert Votolato
Application No. 89-0848F

DECISION AND ORDER

This matter came before the Administrative Adjudication Hearing Officer as an appeal from the Department of Environmental Management's denial of Applicant's request to alter a freshwater wetland. Robert A. Votolato, owner of the property has sought approval to construct a stormwater detention basin encompassing 22,400 square feet (.51 acres) of statutory defined freshwater wetland.

These modification consist of cleaning, excavation, filling, grading and drain installation within an area subject to storm flowage. This wetland is located in the Western Cranston Industrial Park, West Plainfield Pike, Assessor's Plat 36, Lot 4, 15, 44 and 57, Cranston, Rhode Island.

The purpose of the proposed alteration is to construct a detention basin that will serve the industrial park and replace a detention basin which currently exists 220 feet from the wetland.

Patricia K. Rocha represented the applicant and Michael Marran appeared as Counsel for the Division of Groundwater and Freshwater Wetlands.

A pre-hearing conference was held on October 1, 1990. During the prehearing, applicant and the department were granted the right, subject

to the Hearing Officer ruling on relevancy to call further witnesses in their respective case-in-chief and in rebuttal. The parties agreed to enter joint exhibits 1-9 which were marked and entered as full exhibits. A complete list of exhibits is as follows:

JOINT EXHIBITS

- JT1. Formal Application to Alter a Freshwater Wetland. Submitted to the Department on October 30, 1989. (1 page).
- JT2. Evaluation of Application for Permission to Alter Freshwater Wetlands by Daniel M. Kowal dated June 29, 1990. (12 pages).
- JT3. Site Plan Entitled "Western Cranston Industrial Park Subdivision--West Plainfield Pike, Assessor's Plat 36; Lots 4, 15, 44, 47," received by the Department on March 22, 1990.
- JT4. Official Public Notice, signed by Brian C. Tefft, dated March 29, 1990. (2 pages).
- JT5. Denial of Application, letter dated July 11, 1990. (4 pages).
- JT6. Letter requesting Hearing on Denial, signed by Patricia K. Rocha, dated July 20, 1990. (Also envelope and check attached). (4 pages).
- JT7. Notice of Administrative Hearing and Pre-Hearing Conference, dated September 11, 1990. (4 pages).
- JT8. Curriculum Vitae, Daniel Kowal.
- JT9. Curriculum Vitae, Brian C. Tefft.

Applicant had the following 12 exhibits marked for identification:

APPLICANT EXHIBITS

- 10 a - k, 11 a - n, 12 a - g and 13 - 21.
- 10. Department of Environmental Management (DEM) file with respect to Application No. 89-0848F.

- a. Letter to Mr. Dean Albro, Deputy Chief, Division of Groundwater and Freshwater Wetlands, Rhode Island Department of Environmental Management from James M. Schissler, P.E., Senior Staff Engineer, John P. Caito Corporation re: Formal Application Submissions of Documentation. (2 pages).
 - b. Engineering Review Sheet. (2 pages).
 - c. Freshwater Wetlands Review Sheet. (2 pages).
 - d. Letter to Robert A. Votolato, dated February 27, 1990 re: Submission of Site Plan. (2 pages).
 - e. Letter to Brian Tefft from George H. Gifford, III of the John P. Caito Corporation, dated March 15, 1990 re: Response to February 27, 1990 letter.
 - f. Status Sheet re: Submission of Plans.
 - g. Letter of Transmittal Cover Sheet re: Site Plans.
 - h. Status Sheet re: Plans submitted and file ready for notice of public hearing.
 - i. Certificate of Notice sent to abutting property owners, dated March 29, 1990.
 - j. Status Sheet re: Objections (none), dated May 15, 1990.
 - k. Status Sheet re: File to supervisor for decision, dated June 26, 1990.
11. DEM file on Application No. 89-0367D.
- a. Preliminary Determination Application, dated May 10, 1989.
 - b. Freshwater Wetlands Review Sheet, dated August 30, 1989. (2 pages).
 - c. Drainage Report for Western Cranston Industrial Park Subdivision-West by John P. Caito Corporation, received September 1, 1989. (53 pages).
 - d. Engineering Review Sheet, dated September 1, 1989.
 - e. Letter to Robert A. Votolato from Freshwater Wetlands Section, dated September 5, 1989 re: Application technically incomplete with Deficiency Checklist Attached. (3 pages).

- f. Letter to Carmine Aspirino, Division of Groundwater and Freshwater Wetlands, Rhode Island Department of Environmental Management from James M. Schissler, P.E., Senior Staff Engineer, John P. Caito Corporation, dated September 8, 1989 re: three copies of revised plans and installation of drainage manhole 3 to prevent oil from entering the detention base.
 - g. Status Sheet, dated September 12, 1989 re: Response to Engineering Deficiency.
 - h. Freshwater Wetlands Review Sheet, dated September 13, 1989. (2 pages).
 - i. Record of Telephone Discussions, dated October 17, 1989.
 - j. Engineering Review Sheet, dated October 126 1989.
 - k. Letter to Dean Albro, Deputy Chief, Rhode Island Department of Environmental Management from George H. Gifford, III of John P. Caito Corporation, dated October 27, 1989 re: Response to Telephone Deficiency received from Dan Kowal.
 - l. Status Sheet, dated October 30, 1989 re: Response to Biological Deficiency.
 - m. Freshwater Wetlands Review Sheet, dated December 8, 1989. (3 pages).
 - n. Letter to Robert A. Votolato from Brian C. Tefft, Supervisor for Applications, Freshwater Sections, dated September 20, 1989 re: Approval of Application. (4 pages).
12. DEM file on Application No. 89-0120D.
- a. Letter to Dean Albro, Deputy Chief, Division of Groundwater and Freshwater Wetlands, Rhode Island Department of Environmental Management from Shaun M. McBurney, Landscape/Site Planner, dated February 16, 1989 re: Submission of Support Documentation concerning Application for Wetlands Determination.
 - b. Biological Inspection Report, dated April 26, 1989. (2 pages).
 - c. Letter to Robert A. Votolato from Brian C. Tefft, Supervisor for Applications, Freshwater Wetlands Section, dated May 8, 1989 re: notification of presence of freshwater wetlands on property.

- d. Letter to Michael Annarummo, Rhode Island Department of Environmental Management from James M. Schissler, Senior Staff Engineer, John P. Caito Corporation, dated May 11, 1989 re: Enclosure of Documentation for review and approval. (2 pages).
 - e. Letter to Dean Albro, Division of Groundwater and Freshwater Wetlands, Rhode Island Department of Environmental Management from James M. Schissler, Senior Staff Engineer, John P. Caito Corporation, dated May 21, 1989 re: enclosure of additional documentation concerning application 89-0120D. (3 pages).
 - f. Letter to Robert A. Votolato from Brian Tefft, Supervisor for Applications for Freshwater Wetlands Section, dated October 6, 1989 re: notification of presence of freshwater wetlands on property. (2 pages).
 - g. Letter to Dean Albro, Deputy Chief, Division of Groundwater and Freshwater Wetlands, from James M. Schissler, P.E. Senior Staff Engineer, John P. Caito Corporation, dated November 8, 1989 re: Documentations submitted under formal application No. 89-0458D. (3 pages).
13. April 18, 1990 correspondence from DEM re: UIC Order of Approval No. 893 with order attached. (5 pages).
 14. Resumes of John Meyer, John Caito and George Gifford. (4 pages).
 15. Relevant USF & WS National Wetland Inventory Maps (public document).
 16. Relevant FEMA flood hazard maps (public document).
 17. Relevant hydrology & water resources map (public document).
 18. Relevant surface and groundwater quality data (public document).
 19. Relevant aquafilm maps (public document).
 20. Relevant surficial geology (public document).
 21. Relevant bedrock geology (public document).

All other exhibits were introduced during the hearing. The applicant offered applicant's 11 and 13 previously marked for identification, as full exhibits which were admitted without objection. A blue line print

of the site marked Applicant 3A and Applicant exhibits B-D was also admitted as full without objection.

The department proffered no further exhibits.

Several stipulations of fact were made by the parties at the Pre-hearing Conference.

STIPULATIONS OF FACT

1. The Applicant filed all necessary documents and paid all necessary fees to be properly before the Hearing Officer in the above-referenced matter.
2. The formal application, No. 89-0848F was filed with the Department on October 30, 1989.
3. The site plan subject to this hearing was received by the Department on March 22, 1990, Entitled "Western Cranston Industrial Park Subdivision--West Plainfield Pike, Assessor's Plat 36; Lots 4, 15, 44, 47," etc.
4. The site plan was sent out to public notice on March 29, 1990, commencing a forty-five (45) day notice period which ended May 13, 1990.
5. The Department received no public comments during the public comment period.
6. The Department denied this application on July 11, 1990.
7. The Applicant filed a timely request for an adjudicatory hearing on July 20, 1990 (within ten (10) days of service of denial).
8. Robert A. Votolato is the owner of the property in question, City of Cranston Assessor's Plat 36, Lots 4, 15, 44 and 47.

An adjudicatory hearing concerning this application was conducted on Monday October 15, 1990 at the State House, Room 35, Smith Street, Providence, Rhode Island, on October 18, 1990, and on November 19, 1990 at the Administration Building, One Capitol Hill, Providence, Rhode

Island. No members of the public attended the hearing and no comment letters objecting or supporting the proposed project were received.

To enable the Hearing Officer to better understand the testimony adduced at the hearing, a view by the Hearing Officer and the parties was taken on October 18, 1990.

This hearing was conducted pursuant to the Administrative Procedures Act (R.I.G.L. 42-35 et. seq.) and the Administrative Rules of Practice and Procedures of the Administrative Adjudication Division of the Department of Environmental Management adopted July 1990.

The applicant has the burden of proof by preponderance of the evidence pursuant to § 11.02 of the Freshwater Wetlands Rules and Regulations.

At the onset of the hearing, Mr. Marran presented several motions to quash or modify subpoenas issued by applicant's attorney to Brian Tefft and Daniel Kowal. Prior to arguments on these motions an agreement was reached by the parties. The DEM attorney agreed to withdraw his objection to Mr. Tefft's testifying as an adverse witness and Ms. Rocha agreed not to elicit any expert testimony from this witness on direct examination.

The objections to Mr. Kowal's testimony were deemed moot by the Hearing Officer since he was never called by the applicant as a witness.

In his case-in-chief, applicant presented 4 witnesses. John Caito, an engineer, stipulated to by DEM as an expert in civil engineering with a specialty in stormwater management (transc.1 p. 16). John Meyer, Director of Environmental Sciences for Environmental Scientific

Corporation stipulated as an expert biologist with specialization in water quality (transc.2 p.2) and wetland impact assessment (transc.2 p.16). Brian Tefft, DEM Freshwater Wetland Division Supervisor, was called as an adverse witness and stipulated by the state as an expert wetland-wildlife biologist qualified to do wetland impact assessments (transc.1 p.104) and Scott Hobson, a biologist for Environmental Scientific Corporation was also stipulated by the parties as an expert in wetlands wildlife biology (transc.3 p.7).

The department called 2 witnesses: biologists Daniel Kowal and Brian Tefft. Mr. Kowal was qualified as a biologist with expertise in wetland assessment (transc.1 p.57).

Prior to the presentation of Scott Hobson, counsel for the Department sought to bar applicant's biologist from testifying. Mr. Marran pointed out that Mr. Hobson had not been listed as a witness in applicant's pre-hearing discovery and was to testify concerning the results of a "WET" (Wetland Evaluation Technique) analysis which had not been made available to the state. The department's attorney further requested Mr. Meyer's testimony not include any discussion of a "WET" analysis.

Discovery rules are an attempt to ensure both parties review the fullest possible presentation of facts before trial State v. Corcoran 457 A2d 1350 (1982). After questioning of both counsel by the Hearing Officer, it was apparent that Ms. Rocha had informed Mr. Marran of Mr. Hobson's existence and testimony the day she discovered this information. Both attorneys had previously acknowledged at the pre-hearing conference that there might be a need to call further

witnesses. The Hearing Officer finds there was no deliberate attempt by applicant's counsel to mislead or delay the discovery process.

Discovery is an important aspect of the hearing process and complete discovery is essential to a fair hearing, however, refusing to allow a party to call a witness is a drastic sanction State v. Corcoran. supra, State v. Coelho 454 A2d 241 (1982). To cure any prejudice to the state, the Hearing Officer ordered applicant to provide a written summary of Mr. Hobson's testimony and all documentary evidence to the department, within 2 days and to ensure the state sufficient time to review this information, continued the hearing to October 29, 1990. (transc.2 p.44). After reviewing Mr. Votolato's discovery the department requested a further continuance to November 19, 1990, which was granted by the Hearing Officer without objection from the applicant.

During the hearing, Ms. Rocha attempted to establish that the department's denial precludes Mr. Votolato from any beneficial use of his property (transc.2 p.45). It is axiomatic that state government may prohibit uses of private land to ensure the health, safety and welfare of its citizens. The issue if the denial by DEM constitutes a constructive taking of Mr. Votolato's property can not be resolved by this tribunal. The Hearing Officer is constrained to review this appeal according to the factors raised within the denial letter and the testimony addressed on those issues. No final determination is made at this stage of the proceedings, therefore the issue of a "taking" is not ripe for review and will not be addressed further in this opinion. Williamson Planning Commission v. Hamilton Bank 473US 172 (1984).

The factors in this appeal to be determined by the Hearing Officer are as follows:

1. Whether the proposed alterations will cause unnecessary and/or undesirable destruction of freshwater wetlands as described by § 5.03 (c) (7) of the Rules and Regulations Governing the Enforcement of the Rhode Island Freshwater Wetlands Act.
2. Whether the proposed project will result in loss, encroachment and permanent alteration of wetland-wildlife habitat (22,400 ± square feet) (0.51 acres) associated with the subject wetlands area.
3. Whether the subject proposal will cause undesirable reduction of the wildlife habitat values provided by this wetland.
4. Whether the proposed project will reduce the value of a "Valuable" wetland-recreational environment (§ 7.06 (b)) and will reduce and negatively impact the aesthetic and natural character of the undeveloped wetland and adjacent areas which serve as buffer zone.
5. Whether the proposed alterations are inconsistent with the best public interest and public policy stated in § 2-1-18 and 2-1-19 of the Rhode Island Freshwater Wetlands Act and § 1.00 of the Rules and Regulations Governing the Enforcement of the Act.
6. Whether the alternatives to the project identified by the Department are reasonable and practical and will result in substantial reduction of the anticipated impacts from this proposal on the wetland.

HEARING SUMMARY

Among the Division's basis for denial of the application was the finding that this site constitutes a valuable wetland-recreational environment pursuant to § 7.60 (b) of the Wetland Rules. That section states:

"Valuable recreational environment shall mean a relatively natural or undeveloped area which, in its natural state, is capable of supporting recreation by the general public."

An ecological field study of the site was conducted by the DEM's biologist Daniel Kowal on June 29, 1990. (JT.2). In his biological

inspection report and reiterated during testimony, Mr. Kowal found this wetland to be capable of supporting recreation by the general public (transc.2 p.59) and enumerated the activities that could be performed there including bird watching, nature study and education.

Mr. Hobson, applicant's expert biologist agreed that several recreational activities outlined in Mr. Kowal's report are viable recreational uses of this wetland (transc.3 p.36). The developer argues however that many of the activities presently associated with this wetland will be available after construction of the new detention basin therefore no impact on recreational enjoyment exists. This position misconstrues the department's regulations. "Capable of supporting recreation" must be read in context of the entire definition. When read as a whole, § 706 clearly means recreational uses within the wetland as it presently exists.

Applicant's next argument that this site is not in a natural state because it exists within an industrial park is equally without merit. There is uncontroverted testimony that the entire 22,400 square feet of natural wetland will be destroyed.

The Hearing Officer believes any actual or potential recreational uses delineated by the department must be reasonable and practical uses within the wetland. Reviewing the biological inspection report (JT.2) and the site plan (JT.3) it is not unreasonable for the Division to hold this area has recreational value.

Applicant offered neither witnesses or testimony to dissuade the Hearing Officer that this site has no realistic prospect for public

recreational enjoyment. In fact a consensus exists among all biologists that this site can support recreational functions. I find as a fact this site is a valuable recreational wetland.

In light of the above determination I find this wetland has high aesthetic and open space value. Recreational environment is interconnected to wildlife habitat (transc.1 p.92). If the wildlife habitat is eliminated activities such as birdwatching and nature study are no longer available to the general public (transc.1 p.73). In this case the alterations proposed by the developer will obliterate the wetland and the primary reasons for using the site will be terminated.

Mr. Kowal's evaluation did not find this area to be a valuable wildlife habitat as defined in § 7.06 of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands but did determine this project will cause an undesirable reduction of the wildlife values provided by the wetland.

To counter the Department's position, applicant's biologist Scott Hobson performed a wetland evaluation known as the "WET" technique. This technique is developed for use by the US Army Corp of engineers. The WET analysis is a computer program that assigns a probability rating of high, moderate or low to the results of the significance, effectiveness and opportunity of performing 14 different wetland functions and values (transc.3 p.22). Mr. Hobson concluded, based upon the WET analysis, there would be no adverse reduction in the value of wildlife habitat (transc.3 p.35).

The record discloses that under cross-examination, Mr. Hobson

conceded the WET technical manual indicates this method is used primarily for conducting initial rapid assessment of wetlands' functions and values (transc.3 p.40). He also admitted the WET analysis does not make evaluations for certain types of wildlife, including fur-bearers, game mammals, and reptiles. These categories of wildlife are commonly found in wetlands and were specifically noted by Mr. Kowal in his evaluation as actual or potential species to be found on this site. (transc.1 p.71). (JT.5 p.4). Furthermore, of the 42 possible evaluations for social significance, effectiveness, and opportunity, the WET technique did not evaluate 18 out of the 42 possible categories (transc.3 p.46).

Mr. Tefft testified in rebuttal regarding the WET analysis. In his opinion this technique was inappropriately used as the basis for analyzing this site.

"Its use is primarily as one part of a decision-making process. No evaluation technique is meant to be an arbitrator or final arbitrator of disputes. It's only one little cog in the overall decision-making process. That's the use of it, and in WET's case it's meant to highlight for regulators' or planners' decision makers the probability that a wetland or a series of wetlands that might be ranked would even perform a particular function. Once you know the function is there, then the evaluation method is somewhat limited in value". (transc.3 p.68).

The Hearing Officer ascertained from Mr. Hobson that the WET technique is only used to evaluate wetlands. Therefore, the biologist's comparison of the existing wetland to the proposed detention basin appeared incongruous to the Hearing Officer. When questioned on this point Mr. Hobson explained that his calculations assume the land was replaced with wetland plantings recommended by his company and had a water regime conducive to wetland vegetation (transc. 3 p.61-63). Taking

as a fact that the detention basin will assimilate optimum wetland conditions is not a valid assumption. Relying on conditions that do not exist and may never exist is not accepted by the Hearing Officer as a credible analysis.

Applicant attributed a great significance to the fact the Department did no numerical testing to show this project would reduce wildlife habitat (transc.1 p. 91). The Golet Analysis usually employed by the Agency to numerically evaluate a wetland was not conducted on this site because the area was too small to apply the model. Empirical data is not imperative if the denial is based on discernible criteria. In the instant case, DEM biologist Daniel Kowal performed an ecological survey, reviewed existing plant and animal communities, assessed wildlife habitat and wetland wildlife suitability, studied the soil, reviewed aerial photos and conducted several site visits.

Brian Tefft, Mr. Kowal's supervisor, reviewed his findings and after conducting his own analysis and site visits, presented his findings to an interdisciplinary DEM team which made a final determination that the elimination of the wetland would impact the wetland-wildlife habitat (transc.3 p.83).

The Hearing Officer rejects applicant's final argument that an elimination of the wetland is not a reduction of a wildlife habitat and therefore does not fall within the regulations.

After reviewing all the evidence on this issue, including the expertise and experience of the witnesses presented, the Hearing Officer has given greater weight to the department witnesses and finds the

applicant has not met his burden of showing that this project will not cause a undesirable reduction of the wetland habitat values provided by this wetland.

The freshwater rules and regulations (§ 5.03 (c)) permits the Director to deny an application if the proposed project is random, unnecessary or undesirable. The department deemed the existing stormwater basin located 220 ft from the wetland to be a preferable and practical alternative to this project and for that reason found the proposed project to be unnecessary and undesirable.

This basin was approved by DEM in 1989 and is not within a wetland or adjacent to the wetland complex. During the hearing, this basin is referred to as the "temporary" basin. Applicant wishes to fill this land for development and construct a "permanent" detention basin within the biological wetland. To mitigate the loss of this wetland, applicant proposes a planting scheme in and around the new basin of indigenous wetland plants which are expected to assimilate conditions previously existing in the wetland. In the alternative the developer suggests leaving the temporary detention basin and filling the wetland area for construction use (transc.1 p.33).

To justify replacing the temporary basin with a new "permanent" basin in the wetland area, applicant has embarked on a novel defense strategy. Mr. Votolato suggests that the wetland soil is drying out resulting in the area seeking to function as a statutorily defined wetland. In support of this contention, the applicant presented testimony from engineer John Caito, President of John P. Caito Associates. Mr. Caito

stated that prior to the construction of the temporary basin stormwater flow discharged into the area of the proposed permanent basin and now that flow is intercepted by the road system and short circuits the wetland area (transc.1 p.116).

He further testified that the underground injection control system (UIC) put into place by a neighboring business deprives the proposed project site of surface waterflow (transc.1 p.17). Based upon these observations, Mr. Caito concluded that less surface water is flowing into the wetland (transc.1 p.28).

On cross-examination by the state, Mr. Caito was questioned about ground water in the wetland. Testimony revealed that applicant's engineer had never assessed possible underground water emissions and that he was unaware if any underground water feeds into the wetland (transc.1 p.31). When the department reviewed the application for construction of the temporary basin it determined that no streams led into the area, the site was contained shrub and tree vegetation which absorbs water and that some stormwater runoff percolated into the ground. As a result of this analysis DEM came to the conclusion that there were no direct channels to the wetland to be disturbed and that stormwater which fell on the site pre-development would, most likely, never have reached the wetland (transc.1 p.118).

Brian Tefft was part of the DEM review team which approved the temporary basin. In his expert opinion he believes that the discharge from the temporary stormwater basin would not dry out or disturb the character of the wetland (transc.1 p.118).

Mr. John Meyer, applicant's lead biologist testified consistently with Mr. Caito. He stated that in his opinion the installations of the temporary detention basin has resulted in a considerable decrease in surface water flow (transc.2 p.34) and that he expects this deficit to cause a replacement into biological wetland of obligate wetland species towards more facultative type species (transc.2 p.34). Scott Hobson also testified on this issue and his opinion mirrored Mr. Meyer's testimony. He believes the changes in hydrology could lower the water table (transc.3 p.37). Both experts spoke in terms of possibilities, not certainty or even expectation. I find their opinion on this issue to be mere speculation.

The evidence presented by the department contradicts applicant's assertions. Brian Tefft visited the area on two separate occasions and saw no signs of wetland deterioration (transc.1 p.112). Mr. Kowal observed standing water, soil salination, birds, mammals, diverse species, trees and shrubs during all four of his four site visits (transc.1 p. 98 & 112).

After reviewing the application and visiting the site, Mr. Tefft found the area to be a viable wetland habitat, that supports a diverse flora of specific species of plants (transc. p.118).

It should be noted that these visits which depict a thriving wetlands were made approximately 15 months after the installation of the temporary detention basin.

Assuming in arguendo applicant's hypothesis that the wetland is dying is correct he has failed to produce any evidence indicating that the

wetland is not presently supporting wetland vegetation and wildlife and when, if ever, the wetland will cease to function.

The rumors concerning the demise of the wetland are greatly exaggerated. There is simply no evidence that this wetland is not viable or will not continue to function in the future as a statutorily defined wetland.

Evidence from all sources including applicant's expert engineer concluded that the presently existing basin is adequate for the needs of the area, sufficient to attenuate stormflow and meets all city regulations and ordinances (transc. p.35, 76, 109).

In fact, Mr. Caito candidly explained, in response to questioning by the Hearing Officer, that the only reason for this proposal to replace the temporary basin with a permanent basin in the area of the wetland is in order to regain, fill, and develop the area of the temporary basin for other purposes (transc.1 p.35).

This proposed "permanent" basin will serve no purpose other than as a substitute for the already-existing temporary basin, which applicant intends to fill and develop resulting in the unnecessary destruction of a valuable living wetland.

The Hearing Officer further finds the existing temporary basin is a practical and reasonable alternative to the obliteration of the natural wetland.

After reviewing the public policies set forth in R.I.G.L. § 2-1-18 and 2-1-19 and embodied in J.M. Mills v Director of Natural Resources 116 RI 54, 352 A2d 661 (1976), I find this project which will result in the

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permanent alteration of 22,400 square feet of wetland wildlife habitat is not in the best interest of the public and is contrary to the legislative intent of preserving freshwater wetlands.

In this matter, applicant has failed to prove, by a preponderance of the evidence, that the Division erred in any of its conclusions reached in denying the application.

After carefully reviewing all the testimony, exhibits presented, and assessing the credibility of each witness, the Hearing Officer makes the following specific findings of fact and conclusions of law:

FINDINGS OF FACT

1. Notice of the public hearing for this application (89-0848F) was published in the Providence Journal on September 20 and 27, 1990 and in the Beacon Communications, Inc. on September 20 and 27, 1990.
2. Pre-hearing conference was held on October 1, 1990 at the Administration Building, One Capitol Hill, Providence, Rhode Island.
3. A pre-hearing conference record was issued on October 2, 1990 and made a part of the file.
4. A public hearing on this Application was held on October 15, 1990 at the State House, Room 35, Smith Street, Providence and on October 18, 1990 and November 19, 1990, at the Administration Building, One Capitol Hill, Providence, Rhode Island.
5. A view of the site was taken on October 18, 1990.
6. A formal application to alter the wetland was submitted to DEM by the applicant on October 30, 1989.
7. No public comments were received within 45 days of the issuance of the public notice.
8. DEM denied applicant's request to modify the wetland on July 11, 1990.
9. Applicant made a timely request for an appeal.
10. All stenographer notes were received by the hearing officer on December 5, 1990.
11. Memoranda were submitted by both parties on December 14, 1990.
12. The applicant bears the burden of proof by preponderance of the evidence under § 11.02 of the Rules and Regulations Governing the Enforcement of Freshwater Wetlands.

13. An opportunity for public comment was provided at the hearing; No public comment was offered.
14. This parcel is privately owned by Robert A. Votolato.
15. Alterations sought by the applicant is construction of a concrete detention basin within a jurisdictional defined wetland.
16. Construction of this proposed alteration will impact 22,400 square feet (.51 acres) of total wetland area.
17. DEM biologist conducted an ecological field study and evaluation of the area on June 29, 1990.
18. This site is capable of supporting recreational activities.
19. The wetland is a valuable recreational habitat as defined in Freshwater Wetlands Rules and Regulations § 7.06.
20. Applicant's modification of this wetland will reduce the value of a valuable wetland - recreational environment.
21. The proposal will reduce and negatively impact the aesthetic and natural character of the biological wetland.
22. This area is not a valuable wildlife habitat as defined in § 7.06 of the Rules and Regulations governing the Freshwater Wetlands.
23. Construction of the proposed alterations will cause undesirable reduction of the wildlife habitat value provided by this wetland.
24. Applicant conducted a Wetland Evaluation Technique (WET). The "WET" technique is a computer program developed for use by the Army Corp of Engineers to evaluate various wetland functions.
25. The "WET" technique is designed to conduct a rapid assessment of wetland functions.
26. The "WET" technique evaluates wetlands.
27. "WET" is one part of a decision making process.
28. The "WET" technique comparison of a wetland and basin was not a credible analysis.
29. An existing detention basin is located approximately 220 feet from the subject wetland.
30. This detention basin sufficiently services the area and can function on as a permanent basin.

31. The existing basin is a reasonable alternative to the project proposed by the applicant.
32. Proposed alterations by the applicant will cause destruction of a naturally occurring wetland.
33. That the project is not consistent with the legislative intent in R.I.G.L. 2-1-18 and 2-1-19.
34. That the project will not preserve the integrity of the wetland.
35. The project is not in the best interest of the public as outlined in R.I.G.L. 2-1-19.

CONCLUSIONS OF LAW

1. The public hearing was held at the State House, Room 35, Smith Street, Providence, Rhode Island, a location reasonably convenient to the site of the proposed alteration and was in compliance with the statutory requirements regarding the locus of the hearing stated on R.I.G.L. 2-1-22 and 42-35-90 and § 11.00 of the Rules and Regulations Governing the Enforcement of Freshwater Wetlands.

2. Publication of the Notice of Hearing was in substantial compliance with R.I.G.L. 2-1-22(b). This statute requires that publication of the Notice of Hearing be in a newspaper of statewide circulation and in a local newspaper.

3. That this matter is properly before the Administrative Adjudication hearing officer as required by R.I.G.L. 42-17-1, 42-17-7.2.

4. That DEM filed a timely denial letter of applicant's request to alter a Freshwater Wetland on July 11, 1990.

5. That applicant filed an appropriate and timely request for hearing and paid all necessary fees on July 20, 1990.

6. That the area in question is a wetland pursuant to R.I.G.L. 2-1-20.

7. Pursuant to § 11.02 of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act ("Act"), adopted June, 1981, as amended, the Applicant bore the burden of proof that the subject proposal is not inconsistent with the Freshwater Wetlands Act and the Regulations adopted thereunder.

8. This wetland is a valuable recreational environment pursuant to section 7.06 (b) of the Rules and Regulations governing Rhode Island Freshwater Wetlands Act.

9. This project will reduce the value of a valuable wetland recreational environment and will reduce and negatively impact the aesthetic and natural character of the undeveloped wetland.

10. This proposal will cause undesirable reduction of the wildlife habitat provided by the wetland.

11. The proposed project will result in loss, encroachment and permanent alteration of wetland-wildlife habitat (22,400 square feet) (0.51 acres) associated with the subject wetlands area.

12. A reasonable and practical alternative exists to this project which would eliminate any damaging modification to the subject wetland.

13. Approval of this application will cause random, unnecessary, and/or undesirable disturbance or destruction of freshwater wetlands pursuant to § 5.03 (c) of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act.

14. The proposed alteration is inconsistent with the public intent

and public policy as stated in R.I.G.L. § 2-1-18 and 2-1-19 and § 1.00 of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act.

15. Applicant has failed to meet his burden of proof by preponderance of the evidence that the Department erred in any of its conclusions listed in the DEM denial letter of July 11, 1990.

THEREFORE, IT IS

ORDERED

The Department of Environmental Management denial to alter a freshwater wetland Application # 89-0848F be upheld.

I hereby recommend the foregoing Decision and Order to the Director for issuance as a final Order.

_____, 1991
Date

Patricia Byrnes
Hearing Officer

The within Decision and Order is hereby adopted as a final Decision and Order.

_____, 1991
Date

Michael Annarummo
Director
Department of Environmental Management

CERTIFICATION

I hereby certify that I caused a true copy of the within to be forwarded regular mail, postage pre-paid to Michael K. Marran, Esq., Rodio and Ursillo, Ltd., 200 Dyer Street, Providence, Rhode Island 02903 and Patricia K. Rocha, Esq., Adler Pollock & Sheehan Incorporated, 2300 Hospital Trust Tower, Providence, Rhode Island 02903 and via inter-office mail to Kendra Beaver, Esq., Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908 on this 17 day of Jan, 1991.

Cheryl